# Setiausaha Suruhanjaya Pasukan Polis & Ors v Cheah Yen Khee

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–258 OF 2011
CLEMENT SKINNER, ALIZATUL KHAIR AND ROHANA YUSUF JJCA
31 DECEMBER 2015

*Administrative law — Judicial review — Dismissal of public servant — Police officer dismissed from service — Whether dismissal valid — Whether affidavit submitted bore relationship to charge — Whether allegations in affidavit formed new charge — Whether respondents afforded opportunity to explain or rebut allegations — Whether dismissal null and void — Federal Constitution art 135(2)*

The present appeals emanated from the decision of the judicial commissioner ('JC') of the High Court and were heard together, namely appeal No B-01–258 of 2011 ('Appeal 258'); and Appeal No B-01–259 of 2011 ('Appeal 259'). In Appeal 258, the respondent, an investigating officer with the IPD Daerah Kuala Pilah, was charged for the offence of dishonestly arranging for and receiving the payment of RM50,000 by one Tan Chee Keng ('Tan') in return for the release of the Tan's brother from police detention. The respondent was said to have violated the code of conduct under reg 4(2)(f) of the Public Officers (Conduct and Discipline) Regulations 1993 (Amendment 2002) ('the Regulations') and was found guilty of the charge by Suruhanjaya Pasukan Polis ('the first appellant'). The respondent was dismissed from the police force pursuant and this prompted him to apply for judicial review for, inter alia, a declaration that his dismissal from the police force was null and void and in breach of art 135(2) of the Federal Constitution. In Appeal 259, the respondent, a senior investigation officer with IPD Subang Jaya, was charged for failing to appear at a trial in court without valid reasons and failing to comply with the procedures in the management of the seizure of goods. The respondent was said to have violated the code of conduct under reg 4(2)(g) of the Regulations ('the first and second charge') and for dishonestly receiving payment of RM50,000 by Tan in return for the release of the latter's brother, thereby violating the code of conduct under reg 4(2)(f) of the Regulations ('the third charge'). The respondent was then informed that he was found guilty of all three charges. He received only a warning for the first charge but was dismissed from the police force in respect of the second and third charges. Aggrieved, the respondent filed an application for judicial review in Appeal 259. The respondent's application was allowed and the decision was based on the affidavit-in-reply of the first appellant whereby in para 4, the first appellant

had taken into consideration matters in relation to the alleged misuse and abuse of power by both the respondents in the course of carrying out their duties under 'Ops Viper'. Hence, the present appeal by the first appellant appealed against the said decision. The sole issue that arose in both appeals was whether the decision was null and void.

**Held**, dismissing the appeals with costs:

(1) Paragraph 4 of the said affidavit bore no relationship at all to the charge faced by the respondent, which was in relation to the conduct of the respondent in corruptly arranging together with the respondent in Appeal 259 for the payment of RM50,000 by Tan, in return for the release of the latter's brother from police detention. Paragraph 4 of the said affidavit on the other hand referred to investigations carried out by the Bahagian Tatatertib Bukit Aman, in respect of the alleged misuse and abuse of power by the respondent when carrying out 'Ops Viper', an operation undertaken by the respondent against those suspected to be involved in 'kes jenayah harta benda' and 'samun kargo lori' (see paras 26, 34, & 38).

(2) It was clear that 'ex facie' the charge did not relate to Ops Viper. The charge made no mention of the operation code named 'Ops Viper' allegedly undertaken by the respondent against suspects involved in criminal activities relating to theft of property and cargo laden lorries. The JC was correct in holding that the first appellant had taken into account extraneous factors in arriving at its decision to dismiss the respondent from the police force. The allegations contained in the said para 4 amounted to a new charge against the respondent in respect of which the respondent was not given an opportunity to explain, contradict or rebut the same (see paras 39 & 44–45).

(3) Failure of the first appellant to afford this opportunity to the respondent constituted a breach of the fundamental principles of natural justice as enshrined in art 135(2) of the Federal Constitution. The first appellant had infringed the rules of natural justice in not affording the respondent the opportunity to controvert the allegations contained in the said para 4 which would have played a part in influencing the first appellant's decision to impose 'the severest punishment' of dismissal from the police force under the Regulations (see paras 46 & 52).

**[Bahasa Malaysia summary**

Rayuan-rayuan ini bermula daripada keputusan pesuruhjaya kehakiman ('PK') Mahkamah Tinggi dan didengar bersama, iaitu Rayuan No B-01–258 tahun 2011 ('Rayuan 258'); dan Rayuan No B-01–259 tahun 2011 ('Rayuan 259'). Dalam Rayuan 258, responden, pegawai siasatan dengan IPD Daerah Kuala Pilah, dituduh kerana kesalahan tidak jujur mengatur dan menerima

bayaran RM50,000 daripada seorang yang bernama Tan Chee Keng ('Tan') sebagai balasan bagi perlepasan saudara lelaki Tan daripada penahanan polis. Responden dikatakan melanggari tatakelakuan di bawah peraturan 4(2)(f) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) ('Peraturan-Peraturan') dan didapati bersalah terhadap tuduhan oleh Suruhanjaya Pasukan Polis ('perayu pertama'). Responden dibuang daripada pasukan polis dan ini membuatkan dia memohon untuk semakan kehakiman untuk, antara lain, perisytiharan bahawa pembuangan daripada pasukan polis adalah batal dan tak sah dan memungkiri perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan'). Dalam Rayuan 259, responden, pegawai siasatan kanan dengan IPD Subang Jaya, dituduh kerana kegagalan untuk hadir di mahkamah perbicaraan tanpa sebab sah dan kegagalan untuk mematuhi prosedur dalam pengurusan perampasan barangan. Responden dikatakan melanggari tatakelakuan di bawah peraturan 4(2)(g) Peraturan-Peraturan ('tuduhan pertama dan kedua') dan kerana ketidakjujuran menerima bayaran RM50,000 oleh Tan sebagai balasan bagi perlepasan saudara lelaki Tan, dengan itu melanggari tatakelakuan di bawah peraturan 4(2)(f) Peraturan-Peraturan ('tuduhan ketiga'). Responden kemudiannya diberitahu bahawa di didapati bersalah terhadap ketiga-tiga tuduhan. Dia hanya menerima amaran bagi tuduhan pertama tetapi dibuang daripada pasukan polis berkaitan tuduhan kedua dan ketiga. Tidak puas hati, responden memfailkan permohonan untuk semakan kehakiman dalam Rayuan 259. Permohonan responden dibenarkan dan keputusan adalah didasarkan atas afidavit jawapan perayu pertama di mana dalam perenggan 4, perayu pertama telah mengambil kira perkara berkaitan kepada dakwaan salah guna dan penyalahgunaan kuasa oleh kedua-dua responden dalam menjalankan tugas-tugas mereka di bawah 'Ops Viper'. Maka, rayuan ini oleh perayu pertama terhadap keputusan tersebut. Satu-satunya isu yang berbangkit dalam kedua-dua rayuan adalah sama ada keputusan adalah batal dan tak sah.

**Diputuskan**, menolak rayuan dengan kos:

(1) Perenggan 4 afidavit tidak mempunyai hubungan langsung kepada tuduhan yang di hadapai oleh responden, yang mana adalah berkaitan kepada tingkah laku responden bersama mengatur secara korup dengan responden dalam Rayuan 259 bagi bayaran sebanyak RM50,000 oleh Tan, sebagai balasan bagi perlepasan saudara lelaki Tan daripada penahanan polis. Perenggan 4 afidavit tersebut sebaliknya merujuk kepada siasatan-siasatan yang dijalankan oleh Bahagian Tatatertib Bukit Aman, berkaitan dakwaan salah guna dan penyalahgunaan kuasa oleh responden dalam menjalankan 'Ops Viper', operasi oleh responden terhadap orang yang disuspek terlibat dalam 'kes jenayah harta benda' dan 'samun kargo lori' (lihat perenggan 26, 34, & 38).

(2) Ia adalah jelas bahawa 'ex facie' tuduhan tidak berkaitan Ops Viper. Tuduhan tersebut tidak menyatakan mengenai kod operasi bernama

'Ops Viper' didakwa dilaksanakan oleh responden terhadap suspeks yang terlibat dalam aktiviti-aktiviti jenayah berkaitan rompakan terhadap lori yang sarat dengan barangan dan kargo. PK adalah betul dalam memutuskan bahawa perayu pertama telah mengambil kira faktor yang tak relevan dalam mencapai kepada keputusannya untuk membuang responden daripada pasukan polis. Dakwaan yang terdapat di dalam perenggan 4 merupakan tuduhan baru terhadap respoden di mana responden tidak diberi peluang untuk menjelaskan, menyangkal atau mematahkannya (lihat perenggan 39 & 44–45).

(3) Kegagalan perayu pertama untuk memberikan peluang ini kepada responden membentuk pelanggaran prinsip asas keadilan seperti yang ditetapkan dalam perkara 135(2) Perlembagaan. Perayu pertama telah melanggar peraturan-peraturan keadilan semulajadi kerana tidak memberikan kepada responden peluang untuk mempertikaikan dakwaan yang terdapat adalam perenggan 4 tersebut yang mana mungkin memainkan peranan dalam mempengaruhi keputusan perayu pertama untuk mengenakan 'the severest punishment' terhadap pembuangan daripada pasukan polis di bawah Peraturan-Peraturan (lihat perenggan 46 & 52).]

**Notes**

For cases on judicial review in general, see 1(1) Mallal's Digest (5th Ed, 2015) paras 303–457.

**Cases referred to**

*B Surinder Singh Kanda v The Government Of The Federation Of Malaya* [1962] 1 MLJ 169; [1962] 1 LNS 14, PC (folld)

*Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 1 CLJ 773, CA (refd)

*Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; [1995] 1 CLJ 619, CA (refd)

*Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors* [2007] 2 MLJ 370; [2006] 8 CLJ 567, HC (refd)

*Setiausaha Suruhanjaya Pasukan Polis & Ors v Cheah Yen Khee* [2015] MLJU 1257, CA (refd)

*Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364, SC (folld)

**Legislation referred to**

Federal Constitution art 135(2)

Public Officers (Conduct and Discipline) General Orders 1993 (Amended 2002) r 38(g)

**Appeal from**: Judicial Review No 13–11 of 2009 (High Court, Shah Alam)

*Norliza Zulkifli (Nur Farhana Baharuddin with her) (State Legal Advisor's Officer, Selangor).*
*Mohaji Selamat (Mohaji Hazury & Ismail)*

**Alizatul Khair JCA:**

**[1]** Both these appeals arose out of the decision of the learned judicial commissioner of the Shah Alam High Court in *Setiausaha Suruhanjaya Pasukan Polis & Ors v Cheah Yen Khee* [2015] MLJU 1257 (Appeal No B-01–258 of 2011) ('Appeal No 258'). Appeal 258 was heard together with *Setiausaha Suruhanjaya Pasukan Polis & 2 Yg Lain v Ratnakumar a/l Ramasamy* (Appeal No B-01–259 of 2011) ('Appeal No 259'). At the hearing before the learned judicial commissioner both parties agreed that the decision in Appeal No 258 would be binding on Appeal No 259 as they involve the same facts and issues.

**[2]** As stated by the learned judicial commissioner in his grounds of judgment in Appeal No 258 'Kes ini telah dibicarakan bersama kes permohonan Ratnakumar a/l Ramasamy terhadap responden-responden yang sama (Semakan Kehakiman No 13-12 tahun 2009) yang melibatkan fakta dan isu yang serupa. Dengan itu keputusan yang sama seperti di atas juga diberi dalam kes ini'.

**[3]** The learned judicial commissioner had at the conclusion of the hearing allowed the application for judicial review by the respondent, Cheah Yen Khee in Appeal No 258.

BACKGROUND FACTS

*Appeal No 258*

**[4]** The respondent, Cheah Yen Khee joined the police force on 31 July 1987 and after undergoing basic police training at Pulapol, reported for duty as a police constable at Balai Polis Sentul in January 1988.

**[5]** In 1998, the respondent was promoted to the post of police inspector and placed in IPD Subang Jaya as an investigating officer ('IO') until 2001when he was transferred to IPD Subang Jaya.

**[6]** In September 2005, the respondent received instructions that he was to be transferred to IPD Ibu Pejabat Polis Daerah Kuala Pilah, Negeri Sembilan without any reasons and allegations levelled against him.

**[7]** In 2006 the respondent was served with a suspension order, which order remained in force until his dismissal from the police force in 2009.

**[8]** On 7 September 2007, the respondent received a letter from the first appellant informing him that a 'prima facie' case had been made out against him in respect of the following charge:

> Bahawa anda sebagai Pegawai Awam iaitu Inspektor (l/14503) Cheah Yen Khee dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, Ibupejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda telah membuat rundingan dan mengatur tempat pertemuan untuk menerima wang sogokan yang berjumlah RM50,000 (Lima Puluh Ribu Ringgit Malaysia) daripada Tan Chee Keng (K/P: 710302-10-5155) bagi tujuan pembebasan adiknya Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis. Pada 18 March 2005, jam lebih kurang 3.00 petang wang sogokan tersebut telah diserahkan kepada ASP (G/13817) Ratnakumar a/l Ramasamy yang berada di dalam sebuah kereta Perodua Kembara, nombor pendaftaran WJY5581 yang dipandu oleh anda sendiri. Namum begitu, apabila Tan Chee Lai gagal dibebaskan, Tan Chee Keng telah meminta wang RM50,000 dikembalikan kalau tidak beliau akan membuat laporan polis terhadap anda. Sehubungan dengan ini, anda telah mengembalikan wang sogokan dengan memasukkan wang tersebut ke dalam akaun Public Bank nombor 4341512128 milik Tan Chee Keng pada 25 Mac 2005. Oleh yang demikian anda telah melakukan pelanggaran tatakelakuan di bawah Peraturan 4 (2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 seperti berikut:-
>
> 4(2) Seorang pegawai tidak boleh–
>
> (g) tidak jujur atau tidak amanah

**[9]** The respondent denied the aforesaid charge and on 19 February 2008 submitted his written representation to the first appellant. In his representation the respondent alleged that he had a strong defence to the charge including the defence of alibi which required an oral hearing before an investigation committee.

**[10]** As with the respondent Ratnakumar a/l Ramasamy in Appeal No 259, the respondent herein made a similar request (to the first appellant) that he be supplied with the necessary information and documents relating to the aforesaid charge. However he was unsuccessful and his application to the court was similarly dismissed.

**[11]** On 16 April 2009, the respondent was served with a letter from the secretary of the first appellant dated 19 March 2009 (*Pemberitahuan Hukuman Tatatertib*) informing him that the first appellant had found him guilty of the aforesaid charge and dismissed from the police force pursuant to Peraturan

38(g) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002).

**[12]** Following from the abovesaid decision, the respondent filed his application for judicial review for, inter alia, a declaration that his dismissal from the Police Force is null and void for being in breach of art 135(2) of the Federal Constitution in that it contravened the principles of natural justice.

*Appeal No 259*

**[13]** The respondent, Ratnakumar a/l Ramasamy joined the police force as a cadet ASP on 1 December 1997. On 15 August 1998 the respondent was posted to IPD Petaling Jaya where he served as senior investigation officer at the Bahagian Siasatan Jenayah until 2001.

**[14]** From 2001 until March 2005 the respondent was the senior investigation officer with IPD Subang Jaya. On 5 March 2005, the respondent was transferred to IPD Ipoh as ASP in charge of administration (ASP Pentadbiran).

**[15]** In August 2006, the respondent was served with a suspension order dated 18 August 2006 issued by the then Deputy Inspector General of Police, Tan Sri Musa bin Hj Hassan.

**[16]** Subsequently in 2007, the respondent received a letter from the Suruhanjaya Pasukan Polis ('the first appellant') dated 7 September 2007 alleging that a 'prima facie' case has been made out against the respondent in respect of the following three (3) charges:

(a) Pertuduhan Pertama:

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda gagal untuk hadir dalam perbicaraan mahkamah jenayah kes nombor MA2-83-2863/2003 tanpa sebab-sebab yang munasabah dan di mana sapina telah dikeluarkan serta disampaikan kepada anda itu sapina nombor M945957untuk perbicaraan pada 20 Mei 2004; M354869 untuk perbicaraan pada 19 Oktober 2004 dan N215839 untuk perbicaraan pada 26 April 2005 di Mahkamah Majistret Klang. Kegagalan anda untuk hadir telah menyebabkan kes tersebut terpaksa ditangguhkan sebanyak empat (4) kali kerana anda adalah saksi utama iaitu pengadu dan pegawai serbuan kes. Ini adalah bertentangan dengan kehendak seksyen 20(3)(i) Akta Polis 1967 yang menyatakan bahawa salah satu tugas am polis ialah menghadiri mahkamah jenayah. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g),

Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh-

(g) tidak bertanggungjawab

(b) Pertuduhan Kedua

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda tidak mematuhi prosedur tatacara menguruskan barang-barang rampasan Selangor anda didapati gagal membawa balik barang-barang rampasan hasil serbuan di Lot 16290, Taman Cheras Perdana, Balakong Selangor Lampiran 'A' kepada Batu 9 Cheras Repot:2431/2005 bertarikh 14 March 2005 ke IPD Subang Jaya. Sebaliknya anda hanya membawa balik sejumlah kecil barang-barang rampasan tersebut sebagai 'sampel barang bukti' manakala bakinya disimpan di dalam gudang Lot 16290, taman Cheras Perdana, Balakong sehingga waktu Selangor pada keesokannya iaitu pada 15 March 2005 tanpa jagaan dan pengawasan rapi pihak polis. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh–

(g) tidak bertanggungjawab

(c) Pertuduhan Ketiga

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Selangor ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda bersama dengan Inspektor Cheah Yen Khee telah menerima wang sogokan berjumlah RM50,000 (Lima Puluh Ribu Ringgit Selangor) daripada Tan Chee Keng (K/P: 710302-10-5155) pada 18 March 2005 jam lebih kurang 3.00 petang yang mana pada masa tersebut anda berada di dalam sebuah kereta Produa Kembara, nombor pendaftaran WJY 5581 yang dipandu oleh Inspektor Cheah Yen Khee, di kawasan sekitar Restoran McDonald, Taman Selangor Permai berhampiran dengan IPD Subang Jaya, Selangor sebagai balasan supaya membebaskan adiknya iaitu Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis berkait dengan kes Batu 9 Cheras Repot: 2431/2005 bertarikh 14 March 2005. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh–

(g) tidak jujur atau tidak amanah

(Emphasis added.)

**[17]** The respondent denied all three charges and applied for and was granted extension of time by the first appellant to make his representation.

**[18]** His request for information and documents pertaining to the charges to enable him to put up his representation was however not acceded to by the first appellant.

**[19]** The respondent then applied by way of summons in chambers for an order that he be supplied with such information and documents but his application was dismissed by the court. Following the dismissal of this application, the respondent then submitted his representation to the first appellant on 19 February 2008.

**[20]** On 21 April 2009 the respondent was served with a letter from the secretary of the first appellant dated 19 March 2009 (*Pemberitahuan Hukuman Tatatertib*) informing him that he was found guilty of all three charges and that, whilst in respect of the first charge he received only a warning he was dismissed from the police force in respect of the second and third charges.

**[21]** Dissatisfied with the aforesaid decision, the respondent filed an application for judicial review in the High court in Shah Alam.

DECISION OF THE HIGH COURT

**[22]** The learned judicial commissioner allowed the respondent's application for judicial review as he found that the first appellant had taken into account extraneous factors in arriving at its decision. The learned judicial commissioner's decision was based on the affidavit in reply of the Secretary of the Suruhanjaya Pasukan Polis, one Dato' Raja Azahar bin Raja Abdul Manap, dated 9 March 2010 where he states at para 4 (the said para 4) as follows:

> Saya juga menyatakan bahawa Bahagian Tatatertib Bukit Aman telah menerima arahan daripada Ketua Polis Negara untuk menjalankan siasatan salah laku Pemohon yang telah dilaporkan oleh Penolong Pengarah D9, Jabatan Siasatan Jenayah Bukit Aman berhubung dengan penyelewengan serta salahguna kuasa semasa menjalankan tugas serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta benda dan samun kargo lori. Operasi yang dijalankan oleh Pemohon ini dikenali sebagai 'Ops Viper'. Penyelewengan dan salahguna kuasa ini dikesan telah dilakukan sejak tahun 2001 hingga tahun 2005.

**[23]** As found by the learned judicial commissioner:

> ... adalah jelas bahawa keputusan yang dibuat oleh Responden telah dipengaruhi oleh faktor-faktor yang tidak berkaitan dan amat prejudis terhadap Pemohon. Ini telah menyebabkan berlaku ketidakadilan terhadap Pemohon.

ISSUE

**[24]** The sole issue before the court in both appeals was whether the first appellant had taken into account extraneous and irrelevant factors in arriving at its decision based on the said para 4 thereby rendering the decision null and void. It should be noted that the said Dato Raja Azahar bin Raja Abdul Manap filed the same affidavit in reply containing the said para 4 in both judicial review applications in the High Court.

SUBMISSIONS

**[25]** For the appellants, senior federal counsel ('SFC') submitted that the learned judicial commissioner had erred when he found that the first appellant had taken into account extraneous factors based on the said para 4. It was the submission of learned SFC that 'Ops Viper' referred to in para 4 of the said affidavit was not a new charge nor an extraneous factor as alleged by the respondent.

**[26]** The first appellant was merely explaining the background leading to the charge against the respondent when referring to 'Ops Viper' in the affidavit. 'Ops Viper' was the name of the operation undertaken by the respondent against those suspected to be involved in 'kes jenayah harta benda' and 'samun kargo lori'. The respondent was alleged to have misused and abused his power in the course of carrying out the said operation. In this regard, the first appellant stressed that it did not take into account any extraneous factors in considering the charge against the respondents. Rather, in arriving at its decision the first appellant had taken into consideration only the relevant facts and documents before it.

**[27]** The learned judicial commissioner had therefore erred in concluding that based merely on the said para 4 the first appellant had taken into account irrelevant facts which were prejudicial to the respondent. The respondent had been given every opportunity to defend himself against the charges including extension of time to put up his representation to the first appellant. Therefore there was no injustice caused to the respondent to warrant the court to exercise its powers of judicial review.

**[28]** Learned counsel for the respondent, on the other hand argued that the learned judicial commissioner's decision was in accord with the principles of natural justice as no man shall be condemned unheard.

**[29]** In this case, it would appear from the said para 4 that the first appellant had taken into consideration extraneous matters pertaining to the alleged misuse and abuse of power by both the respondents in the course of carrying

out their duties under 'Ops Viper'. According to the deponent of the said affidavit, Dato' Raja Azahar bin Abdul Manap, the alleged abuse of power by the respondents had been going on since 2001 until 2005. However it was very clear from the charges framed against both respondents that the charges did not relate to 'Ops Viper' and the alleged abuse of power allegedly committed by the respondents between 2001 and 2005 while carrying out their duties under 'Ops Viper'.

**[30]** The respondent's representation also made no mention of the same. These allegations in fact amounted to a new charge against the respondent and was highly prejudicial to the respondent as he was not given an opportunity to rebut these allegations.

**[31]** In this regard, it was learned counsel for the respondent's submission that it is a principle of law based on established judicial precedent that in a situation where a public decision making body takes into account extraneous matters behind the backs of the party aggrieved by the decision, the decision of that public authority will be rendered unlawful for being in breach of the principles of 'natural justice', or 'audi alterem partem' and for being unreasonable (in the Wednesbury sense) and procedurally unfair. The respondents relied, inter alia, on the following authorities in support of their submission:

(a) *B Surinder Singh Kanda v The Government Of The Federation Of Malaya* [1962] 1 MLJ 169; [1962] 1 LNS 14;

(b) *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308; [1995] 1 CLJ 619;

(c) *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364;

(d) *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [2008] 2 MLJ 1; [2008] 1 CLJ 773; and

(e) *Sazali bin Abdullah v Ketua Polis Negeri Perak & Ors* [2007] 2 MLJ 370; [2006] 8 CLJ 567.

OUR DECISION

**[32]** Having heard both parties' submission, we found that the learned judicial commissioner did not err in law or in fact in arriving at his decision and we therefore dismiss the appeal with costs.

**[33]** In our view the learned judicial commissioner was correct in holding that the appellants, in particular the first appellant, had taken into account extraneous factors in arriving at its decision to dismiss the respondent from the police force.

**[34]** We agree with learned counsel for the respondent that contrary to the SFC's assertion para 4 of the said affidavit bears no relationship at all to the charge faced by the respondent. To recapitulate the charge faced by the respondent reads as follows:

> Bahawa anda sebagai Pegawai Awam iaitu Inspektor (I/14503) Cheah Yen Khee dalam Pasukan Polis Diraja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Jenayah, Ibu pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda telah membuat rundingan dan mengatur tempat pertemuan untuk menerima wang sogokan yang berjumlah RM50,000 (Lima Puluh Ribu Ringgit Malaysia) daripada Tan Chee Keng (KP: 710302-10-5155) bagi tujuan pembebasan adiknya Tan Chee Lai (KP: 760609-14-5165) daripada tahanan polis. Pada 18 March 2005, jam lebih kurang 3.00 petang wang sogokan tersebut telah diserahkan kepada ASP (G/13817) Ratnakumar a/l Ramasamy yang berada di dalam sebuah kereta Perodua Kembara, nombor pendaftaran WJY5581 yang dipandu oleh anda sendiri. Namun begitu, apabila Tan Chee Lai gagal dibebaskan, Tan Chee Keng telah meminta wang RM50,000 dikembalikan kalau tidak beliau akan membuat laporan polis terhadap anda. Sehubungan dengan ini, anda telah mengembalikan wang sogokan dengan memasukkan wang tersebut ke dalam akaun Public Bank nombor 4341512128 milik Tan Chee Keng pada 25 Mac 2005. Oleh yang demikian anda telah melakukan pelanggaran tatakelakuan di bawah Peraturan 4 (2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 seperti berikut:-
>
> 4(2) Seseorang pegawai tidak boleh–
>
> (f) tidak jujur atau tidak amanah.

**[35]** For completeness, the charge faced by the respondent in Appeal No 259 were as follows:

> (a) Pertuduhan Pertama:
>
> Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda gagal untuk hadir dalam perbicaraan mahkamah jenayah kes nombor MA2-83-2863/2003 tanpa sebab-sebab yang munasabah dan di mana sapina telah dikeluarkan serta disampaikan kepada anda itu sapina nombor M945957 untuk perbicaraan pada 20 Mei 2004; M354869 untuk perbicaraan pada 19 Oktober 2004 dan N215839 untuk perbicaraan pada 26 April 2005 di Mahkamah Majistret Klang. Kegagalan anda untuk hadir telah menyebabkan kes tersebut terpaksa ditangguhkan sebanyak empat (4) kali kerana anda adalah saksi utama iaitu

pengadu dan pegawai serbuan kes. Ini adalah bertentangan dengan kehendak seksyen 20(3)(i) Akta Polis 1967 yang menyatakan bahawa salah satu tugas am polis ialah menghadiri mahkamah jenayah. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh–

(g) tidak bertanggungjawab

(b) Pertuduhan Kedua

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) Ratnakumar a/l Ramasamy dalam pasukan Polis DiRaja Malaysia ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak bertanggungjawapan iaitu anda tidak mematuhi prosedur tatacara menguruskan barang-barang rampasan Selangor anda didapati gagal membawa balik barang-barang rampasan hasil serbuan di Lot 16290, Taman Cheras Perdana, Balakong Selangor Lampiran 'A' kepada Batu 9 Cheras Repot: 2431/2005 bertarikh 14 March 2005 ke IPD Subang Jaya. Sebaliknya anda hanya membawa balik sejumlah kecil barang-barang rampasan tersebut sebagai 'sampel barang bukti' manakala bakinya disimpan di dalam gudang Lot 16290, taman Cheras Perdana, Balakong sehingga waktu Selangor pada keesokannya iaitu pada 15 March 2005 tanpa jagaan dan pengawasan rapi pihak polis. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(g), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh–

(g) tidak bertanggungjawab

(c) Pertuduhan Ketiga

Bahawa anda sebagai Pegawai Awam iaitu Penolong Penguasa (G/13817) *Ratnakumar a/l Ramasamy* dalam pasukan Polis DiRaja Selangor ketika itu bertugas sebagai Pegawai Penyiasat Kanan, Ibu Pejabat Polis Daerah Subang Jaya, Selangor telah didapati tidak jujur atau tidak amanah kerana anda bersama dengan Inspektor Cheah Yen Khee telah menerima wang sogokan berjumlah RM50,000 (Lima Puluh Ribu Ringgit Selangor) daripada Tan Chee Keng (K/P: 710302-10-5155) pada 18 March 2005 jam lebih kurang 3.00 petang yang mana pada masa tersebut anda berada di dalam sebuah kereta Produa Kembara, nombor pendaftaran WJY 5581 yang dipandu oleh Inspektor Cheah Yen Khee, di kawasan sekitar Restoran McDonald, Taman Selangor Permai berhampiran dengan IPD Subang Jaya, Selangor sebagai balasan supaya membebaskan adiknya iaitu Tan Chee Lai (K/P:760609-14-5165) daripada tahanan polis berkait dengan kes Batu 9 Cheras Repot: 2431/2005 bertarikh 14 March 2005. Oleh yang demikian anda telah melakukan perlanggaran tatakelakuan di bawah Peraturan 4(2)(f), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (Pindaan 2002) seperti berikut:

4(2) Seorang pegawai tidak boleh–

(g) tidak jujur atau tidak amanah

(Emphasis added.)

**[36]** The said para 4, if it can be recalled, states to the following effect:

> Saya juga mengatakan bahawa Bahagian Tatatertib Bukit Aman telah menerima arahan daripada Ketua Polis Negara untuk menjalankan siasatan salahlaku Pemohon yang telah dilaporkan oleh Penolong Pengarah D9, Jabatan Siasatan Jenayah Bukit Aman berhubung dengan *penyelewengan serta salahguna kuasa semasa menjalankan tugas serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta benda dan samun kargo lori.*
>
> *Operasi yang dijalankan oleh Pemohon ini dikenali sebagai 'Ops Viper'. Penyelewengan dan salahguna kuasa ini dikesan telah dilakukan sejak tahun 2001 hingga tahun 2005.*
>
> (Emphasis added.)

**[37]** As can be seen from the above, the charge against the respondent was very specific. It relates to the conduct of the respondent in corruptly arranging together with the respondent in Appeal No 259 (Ratnakumar a/l Ramasamy) for the payment of the sum of RM50,000 by one, Tan Chee Keng, in return for the release of the latter's brother, Tan Chee Lai, from police detention. The incident was alleged to have taken place on 18 March 2005.

**[38]** Para 4 of the said affidavit on the other hand, refers to an investigation carried out by the Bahagian Tatatertib Bukit Aman, in respect of the alleged misuse and abuse of power by the respondent when carrying out 'Ops Viper', which was allegedly detected to have taken place in 2001 until 2005.

**[39]** It is clear from the above that 'ex facie' the charge did not relate to 'Ops Viper'. It made no mention of the operation code named 'Ops Viper' allegedly undertaken by the respondent against suspects involved in criminal activities relating to theft of property and cargo laden lorries.

**[40]** There was also no reference in the charge to the alleged misuse and abuse of power by the respondent in carrying out 'Ops Viper' which had allegedly taken place since 2001 until 2005.

**[41]** In light of the above, we were unable to agree with learned SFC's submission that "Ops Viper' bukanlah pertuduhan baru atau faktor luaran seperti yang dinyatakan di dalam afidavit balasan responden'.

**[42]** Learned SFC in her written and oral submission explained that the first appellant was merely stating the background of the investigation and stressed that in arriving at its decision it had taken into account only the relevant facts and documents.

**[43]** However learned SFC's submission that in the said para 4 the first appellant was merely explaining the background of the investigation and not alleging a new fact or charge was merely a statement from the Bar as the appellants failed to file any affidavit asserting the same, in response to the respondent's affidavit in reply. In respect of the allegation contained in the said para 4, the respondent had stated as follows:

> 10 Merujuk kepada perenggan 4 Afidavit Jawapan Responden Pertama dan Kedua, saya sesungguhnya menyatakan bahawa pengataan tersebut perlu dibatalkan dari rekod Mahkamah dan tidak diambil kira dalam pertimbangan kes ini kerana kandungan pengataan tersebut menimbulkan pertuduhan-pertuduhan baru ke atas Pemohon selain dari satu-satunya yang ditimbulkan dalam pertuduhan disiplin ke atas saya di mana antara lainnya dakwaan baru bahawa Pemohon telah melakukan penyelewengan dan melakukan salah guna kuasa semasa menjalankan serbuan dan tangkapan terhadap saspek yang melibatkan kes jenayah harta benda dan samun kargo lori dalam operasi 'Ops Viper' dan kesalahan penyelewengan dan salahguna kuasa ini dikesan TELAH dilakukan sejak tahun 2001 hingga tahun 2005.
>
> 12 Saya sesungguhnya menyatakan bahawa pengataan bahawa kesalahan penyelewengan dan salahguna kuasa ini [oleh Pemohon] dikesan TELAH dilakukan sejak tahun 2001 hingga tahun 2005 adalah fitnah dan tohmahan semata-mata serta amat memprejudiskan dan berniat jahat kerana jika benarlah pihak polis telah mengesahkan saya telah melakukan kesalahan-kesalahan tersebut dari tahun 2001 hingga tahun 2005 (6 tahun), kenapa saya tidak dituduh di mana-mana Mahkamah untuk kesalahan tersebut (saya nafikan dengan keras) dan kenapa satu-satunya pertuduhan disiplin ke atas saya tidak berkaitan dan tidak bersangkutan langsung dengan kesalahan-kesalahan yang baru ditimbulkan tersebut.

**[44]** In view of the foregoing we found ourselves in agreement with learned respondent's counsel's submission that based on the said para 4 the first appellant had indeed taken into account extraneous and irrelevant factors in arriving at its decision to dismiss the respondent from the police force.

**[45]** We also agreed with learned counsel that the allegations contained in the said para 4 amounted to a new charge against the respondent in respect of which the respondent was not given an opportunity to explain, contradict or rebut the same.

**[46]** Failure of the first appellant to afford this opportunity to the respondent, constituted in our view a breach of the fundamental principles of natural justice as enshrined in art 135(2) of the Federal Constitution.

**[47]** In this regard we refer to the celebrated case of *B Surinder Singh Kanda v The Government of the Federation of Malaya* in which Lord Denning made the following observation:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in Board of Education v Rice down to the decision of Their Lordship's Board in *Ceylon University v Fernando*.
>
> > It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing.

**[48]** Lord Denning's legal proposition in the aforesaid case have been consistently applied by our courts in a number of cases involving disciplinary action by public authorities, most notably the case of *Shamsiah bte Ahmad Shah v Public Services Commission*, the facts of which are somewhat similar to the facts in the appeal before us.

**[49]** In holding that Shamsiah's dismissal was null and void, Jemuri Serjan SCJ speaking for the Supreme Court, found as follows:

> The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took to account extraneous matters, namely the appellant's record of past conduct which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.
>
> What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them.
>
> It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.
>
> We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R v Deputy Industrial Injuries Commissioner, ex p Jones and Fairmont Investments Ltd v Secretary of State for the Environment.*

> It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under 1969 Regulations.
>
> On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

**[50]** Similarly here the allegations contained in the said paragraph can be said to relate to the respondent's past conduct which were not made available to the respondent.

**[51]** And here too the core complaint of the respondent is that the first appellant had breached the principles of natural justice in that in arriving at its decision to dismiss him from service, the first appellant had taken into consideration extraneous matters namely the respondent's past conduct based on the allegations contained in the said para 4, without giving him an opportunity to defend himself against the said allegations.

**[52]** Applying the principles set out in *B Surinder Singh Kanda* and *Shamsiah bte Ahmad Sham* above we found that the first appellant had infringed the rules of natural justice in not affording the respondent the opportunity to explain or controvert the allegations contained in the said para 4 which in our view would have played a part in influencing the first appellant's decision to impose 'the severest punishment' of dismissal from the police force under the Public Officers (Conduct and Discipline) General Orders 1993 (Amended 2002).

**[53]** As trenchantly observed by Jemuri Serjan SCJ in *Shamsiah bte Ahmad Sham*:

> It is not a matter of pure technicality but it is *absolutely fundamental in law* that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter.

**[54]** For the above reasons we dismissed the appeal with costs. As agreed by parties our decision in this appeal would be binding on Appeal No 259 and as such Appeal No 259 is also dismissed with costs.

*Appeals dismissed with costs.*

Reported by Afiq Mohamad